809148-8

NO. 36606-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

FILED
COURT OF APPEALS
DIVISION II
07 SEP -6 AM 9:17
STATE OF WASHINGTON
BY
DEPUTY

STATE OF WASHINGTON, Respondent

v.

TYLER KING, Petitioner

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO. 06-1-02322-6
FROM THE DISTRICT COURT FOR CLARK COUNTY NO. 63660
(RALJ APPEAL)

RESPONSE TO MOTION FOR DISCRETIONARY REVIEW

Attorneys for Respondent:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

JEFFREY W. HOLMES, WSBA #37904
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. IDENTITY OF ANSWERING PARTY

COMES NOW the Respondent, State of Washington, by and through Jeffrey W. Holmes, Deputy Prosecuting Attorney and Jeff Staples, Rule Nine Intern for Clark County, and provides the following answer to the petitioner's motion for discretionary review.

II. STATEMENT OF THE CASE

On April 5, 2006, Officer Jeffrey Starks of the Vancouver Police Department observed a motorcycle driving on I-5 southbound at exit 14 in Clark County, Washington. This was outside of Officer Starks' primary area of jurisdiction within the city limits of Vancouver. Officer Starks witnessed the driver, later identified as the petitioner Tyler King, stand up on his motorcycle while driving around 70 miles per hour, stare at, and possibly taunt another vehicle, and then drive away at around "a hundred miles an hour." (District Court Case No. 63660, RP 158-165). At the time, the freeway was "a little congested." (RP 165). Officer Starks activated his emergency lights, caught up to the motorcycle and contacted the petitioner. (RP 167-168). Officer Starks issued the petitioner a citation for reckless driving pursuant to RCW 46.61.500. (RP 161-171).

At trial, Officer Starks testified that he had been employed with the City of Vancouver for over six years, and previously worked as a police

officer in the State of Kentucky. (RP 159). While assigned to the Vancouver Traffic Division as an accident reconstructionist, he issued quite a few speeding tickets and investigated "[q]uite a few" incidents of reckless driving during his time with the City. After discussing his background, Officer Starks identified the defendant, and then testified regarding the events that transpired on April 5, 2006. (RP 160-161). Officer Starks further testified that he had been trained in detecting reckless driving and that when he issued the petitioner the citation he did so because he felt that the petitioner's actions fell within those elements. (RP 171). During closing argument, the prosecutor highlighted this portion of Officer Starks' testimony. (RP 273).

III. SUMMARY OF ANSWER

The petitioner has not established that under RAP 2.3(d) the Superior Court decision is:

> 1) in conflict with a decision of the Court of Appeals or the Supreme Court; or
> 2) a significant question of law under the Washington State Constitution or the United State's Constitution; or
> 3) one that involves an issue of public interest that must be determined by an appellate court; or
> 4) that the Superior Court departed from the accepted and usual course of judicial proceedings.
>
> RAP 2.3(d)

The Superior Court correctly found that under City of Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993), Officer Starks' testimony was not improper because it did not directly comment on the defendant's guilt, was otherwise helpful to the jury, and was based on inferences from the evidence. Further, the facts in this case are distinguishable from those presented in the cases cited by the petitioner, State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987); State v. Garrison, 71 Wn.2d 312, 427 P.2d 1012 (1967); State v. Farr-Lenzini, 93 Wn. App. 453, 970 P.2d 313 (1999).

The decision by the Superior Court does not involve any issues of public interest which should be determined by an appellate court. The emergency clause of RCW 10.93.070 is clear on its face and has already been addressed by this Court in City of Tacoma v. Durham, 95 Wn. App. 876, 978 P.2d 514 (1999).

IV. ISSUES

1. Did Officer Starks invade the province of the jury by testifying that, at the time he cited the petitioner for reckless driving, he did so because he believed the petitioner's actions constituted reckless driving?

2. Did the Superior Court err in ruling that the petitioner's arrest by an officer out of his primary jurisdiction was valid under RCW 10.93.070(2)?

V. RESPONSE TO MOTION

A. Review is not authorized under RAP 2.3(d)(1)

1. The Superior Court's decision regarding the admissibility of the officer's opinion testimony was consistent with City of Seattle v. Heatley.

This court should deny review under RAP 2.3(d)(1) because the decision of the Superior Court in this case was entirely consistent with prior Court of Appeals and Supreme Court cases.

The Superior Court ruled that Officer Starks' testimony, which stated that at the time he issued the petitioner a citation for reckless driving the petitioner was driving recklessly, was admissible under City of Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993). The Court in Heatley held that, while in general a witness may not testify to his opinion as to the guilt of the defendant, "testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *Id.* at 577-578.

In the instant case, Officer Starks testified that when he stopped the petitioner, he did so because in his opinion the petitioner's actions were reckless. The prosecutor then asked the officer whether he was trained on the elements of reckless driving and whether the petitioner's actions were

within those elements. The officer responded that he was trained in this area and he felt the petitioner's actions qualified. (RP 170-171). Officer Starks did not say directly that he believed the petitioner was guilty. He did not go through the elements of reckless driving and explain how the petitioner's actions satisfied each element. The prosecutor merely asked Officer Starks these questions to lay a foundation for why the officer issued the petitioner a citation for reckless driving.

Officer Starks' testimony was helpful to the jury because it demonstrated that he did not issue the petitioner the citation frivolously or out of spite. In this way it contributed to the overall context and coherency of his testimony. Officer Starks' opinion testimony was also based on inferences from the evidence. He testified that he observed the petitioner stand up on his motorcycle, stare at the vehicle next to him, and then sit down and accelerate to approximately 100 mph. (RP 158-165). It was from these observations and his knowledge of the elements of reckless driving that Officer Starks inferred his opinion that the petitioner committed the crime of reckless driving. Because Officer Starks' testimony did not comment directly on the defendant's guilt or the veracity of a witness, was helpful to the jury and was based on inferences from the evidence, it was not improper opinion testimony.

It is also important to note that, while the ultimate question of fact in this case involves the issue of whether the petitioner's actions constituted reckless driving, that does not necessarily mean Officer Starks' testimony was improper because it touched on this issue. The Court in Heatley held that "an opinion is not improper merely because it involves ultimate factual issues. ER 704 provides that 'testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.'" Heatley at 577-578. Officer Starks did not testify as to his present opinion regarding the petitioner's guilt or to what verdict the jury should reach. He merely stated what thoughts motivated his actions leading up to the citation of the petitioner. Moreover, the testimony was completely innocuous because any reasonable juror would infer from Officer Starks issuing the petitioner a citation for reckless driving that he believed at that time that the petitioner had committed that crime. In this way Officer Starks' testimony merely confirmed what his actions already clearly implied.

2. **This case is distinguishable from those cited by the petitioner.**

One of the primary cases on which the petitioner relies in his motion for review is State v. Garrison, 71 Wn.2d 312, 427 P.2d 1012 (1967). In that case, the Washington Supreme Court held that the trial

court was correct to refuse to allow the owner of a tavern to testify to his opinion regarding whether the defendant participated in the burglary of that tavern. The Court found that the witness was in no better position than anyone else investigating the crime to give an opinion as to who committed the burglary. Garrison at 315. The Court went on to state that,

> "[t]he question literally asked the witness to express an opinion on whether or not the appellant was guilty of the crime charged. Obviously this question was solely for the jury and was not the proper subject of either lay or expert opinion." *Id.*

The circumstances presented in the instant case are different from those presented in Garrison in at least two ways. First, in Garrison the witness was in no better position than anyone else to offer an opinion as to whether the defendant had committed the burglary. In this way his testimony served no purpose other than to invade the province of the jury. In the instant case, Officer Starks' testimony was based on his observations and served the important purpose of providing a foundation for why he contacted and eventually arrested the petitioner.

Second, unlike in Garrison, Officer Starks was not literally asked to give an opinion as to whether the defendant was guilty of reckless driving. Rather, Officer Starks was asked whether at the time he cited the petitioner he was familiar with the elements of reckless driving and believed what he had witnessed satisfied those elements. This is not the

same as asking the officer if he presently believed that the petitioner was guilty of the crime for which he was charged. As stated above, Officer Starks was merely providing a foundation for the citation.

Petitioner also relies on State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987). In that case, the Washington Supreme Court ruled that a rape counselor could not testify that the alleged rape victim exhibited classic signs of rape trauma syndrome and was therefore likely raped. The court determined that this testimony constituted an opinion as to the guilt of the defendant. Black at 348-349. The testimony in the instant case is clearly distinguishable from that in Black. Officer Starks did not testify that the petitioner was likely guilty because of observations he made of a third party after the alleged incident occurred. Whereas the testimony in Black could serve no purpose but to buttress the credibility of the victim's allegations and in that way comment on the defendant's guilt, Officer Starks' testimony in the instant case served as the foundation for why he cited the petitioner for reckless driving. Officer Starks' citation of the petitioner was helpful to the jury because it contributed to the context and coherency of the overall incident.

Further, petitioner also relies on State v. Farr-Lenzini, 93 Wn. App. 453, 970 P.2d 313 (1999). In Farr, the officer testified at trial that in his opinion, based on his training and experience, the defendant's driving

pattern demonstrated that the defendant "was attempting to get away from [him] and knew [he] was back there and refus[ed] to stop." Farr-Lenzini at 459. The Washington Court of Appeals held that this was improper opinion testimony. The Court acknowledged that under Heatley opinion testimony as to the ultimate fact is admissible if it satisfies the requirements of both ER 403 and either ER 701 if the witness is testifying as a lay person or ER 702 if the witness is testifying as an expert. While the trial court in Farr did not state whether the officer was testifying as a lay person or an expert, the Court of Appeals found that the officer's testimony neither meet the requirements of ER 701 nor ER 702. *Id.* at 460.

The officer's testimony in Farr did not satisfy the requirements of ER 702 because it was outside his area of expertise and it was not helpful to the jury. Farr at 461. While the officer did qualify as an expert for purposes of police procedures, speed, vehicle dynamics, and accident reconstruction, the Court stated that "[t]he record here does not indicate that the trooper was qualified to testify as an expert on the driver's state of mind," which was the subject of the disputed testimony. *Id.* The Court also found that the officer's testimony was not helpful to the jury because "a lay jury, relying upon its common experience and without the aid of an

expert, is capable of deciding whether a driver was attempting to elude." *Id.* at 462.

The Court in Farr also found the officer's testimony did not satisfy the requirements of ER 701. For lay testimony to be admissible under this rule, the opinion must be both rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. Also, where a core factual issue is involved, "there must be a substantial factual basis supporting the opinion." *Id.* at 463. The Court determined that the testimony did relate to a core factual issue and did not satisfy the substantial factual basis requirement because the "limited facts provide slim support for the trooper's opinion as to what the driver was thinking during the high speed, four-and-a-half minute pursuit." *Id.* at 464.

This case is distinguishable from Farr-Lenzini. While neither the District nor Superior Court determined whether Officer Starks was testifying as an expert or as a lay witness, his testimony in this case would meet the requirements of either ER 702 or ER 701. If he was testifying as an expert, then his testimony certainly seems to be within his area of expertise. Unlike in Farr-Lenzini, Officer Starks did not testify to the petitioner's state of mind, but only to his opinion of the risks involved in the driving he saw. Officer Starks testified that he was trained in detection

of reckless driving. (RP 170-171). The testimony was helpful to the jury because it helped explain why he issued the petitioner the citation.

If Officer Starks was testifying as a lay witness, then the subject of his testimony probably did relate to a core factual issue. However, unlike in Farr-Lenzini, there is a substantial factual basis which Officer Starks testified to that provided the foundation for his opinion. Officer Starks testified in detail about the actions he witnessed and stated that these observations were the basis for the opinion he formed at the time of the citation. In this way, the testimony was both rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony.

For the foregoing reasons, the Superior Court's decision is entirely consistent with prior Court of Appeals and Supreme Court cases. Therefore, this Court should deny review under RAP 2.3(d)(1).

B. Review is not authorized under RAP 2.3(d)(2)

For the reasons stated above, this court should also deny review under RAP 2.3(d)(2). It is clear under the Washington cases that have dealt with improper opinion testimony, including those cited above, that the testimony at issue in this case did not improperly comment directly on the guilt of the petitioner and therefore did not invade the province of the

jury. As a result, there is no significant question of law under the Washington Constitution.

C. Review is not authorized under RAP 2.3(d)(3)

The decision below does not involve an issue of public interest which should be determined by an appellate court; therefore the court should also deny review under RAP 2.3(d)(3). The petitioner argues that the scope of RCW 10.93.070 (2) presents an issue of public interest. However, based on the plain language of the statute in question and this Court's prior decision in City of Tacoma v. Durham, 95 Wn. App. 876, 978 P.2d 514 (1999), it is evident that no such issue is presented.

RCW 10.93.070 states that a general authority Washington peace officer may enforce the traffic or criminal laws of this state throughout its territorial bounds under certain enumerated circumstances. One of those enumerated circumstances is in response to an emergency involving an immediate threat to human life or property. RCW 10.93.070 (2). It is evident from the way the legislature structured this statute that this was meant to be a broad grant of authority. The statute does not itemize what laws may be enforced under what circumstances, but instead vests general law enforcement officers with the authority to enforce any criminal or traffic law where any of the enumerated circumstances exists.

Not only does the statute give a broad grant of authority to general law enforcement officers, but this Court has previously interpreted that section as granting authority for a stop under similar circumstances. In City of Tacoma v. Durham, a transit supervisor saw the defendant's car driving erratically in Tacoma. Radio dispatch informed a Tacoma police officer of the defendant's dangerous driving. When he caught up to the defendant's car, it was located in the City of Lakewood. The officer activated his emergency lights and stopped the defendant. The officer smelled a strong odor of alcohol when he approached the defendant. After conducting field sobriety tests, the officer arrested the defendant on suspicion of Driving Under the Influence. Durham at 877.

The Court first found that the stop was valid under the fresh pursuit clause of RCW 10.93.070. *Id.* at 880-881. The Court then went on to note that the stop was also appropriate under the emergency clause of RCW 10.93.070. It found that, where the officer observed the defendant's car weaving and nearly striking a police car, "[c]learly, this situation presented an emergency, and [the officer] reasonably responded across jurisdictional lines. Such erratic driving was an immediate threat to human life or property." *Id.* at 881-882.

In the instant case, the officer observed the petitioner stand up on the foot pegs of his motorcycle while traveling at a high rate of speed,

staring at and perhaps taunting the vehicle next to him. The officer then observed the defendant sit down and speed off while changing lanes at what the officer estimated to be 100 mph. (RP 158-165). Any reasonable person would believe that these actions constituted reckless driving and posed an immediate threat to the safety of persons or property. And as stated above, this Court found that such a threat was posed by comparable driving in Durham.

Moreover, even ignoring the petitioner's standing on the foot pegs and staring at the vehicle next to him, under RCW 46.61.465 the petitioner's speed alone is indicative of reckless driving. The statute states that "[t]he unlawful operation of a vehicle in excess of the maximum lawful speeds provided in this chapter at the point of operation and under the circumstances described shall be prima facie evidence of the operation of a motor vehicle in a reckless manner by the operator thereof." RCW 46.61.465. Reckless driving is defined as driving a vehicle "in willful or wanton disregard for the safety of persons or property..." RCW 46.61.500. Therefore, reading these two statutes together, the Washington legislature has determined that speeding is prima facie evidence of driving in willful or wanton disregard for the safety of persons or property. It seems difficult to argue that driving in willful or wanton disregard for the safety of persons or property does not pose an immediate threat to persons

or property as RCW10.93.070 requires. For these reasons the petitioner's speed provided Officer Starks with a basis to stop the petitioner even without considering the petitioner's other actions.

Petitioner argues that the emergency clause should not authorize general authority peace officers to stop motorists outside their areas of primary jurisdiction for minor speeding offenses, but that is not the case presented here. It is apparent from Officer Starks' testimony that the petitioner's actions were far more serious than ordinary speeding. The petitioner's actions of standing up on the foot pegs of his motorcycle while staring at the vehicle next to him and then sitting down and accelerating to 100 mph justified the officer in believing that the petitioner was an immediate threat to persons or property. This is evident from the plain language of RCW 10.93.070 and RCW 46.61.465 and this Court's prior decision in Durham. Because this matter has already been clearly addressed by the legislature and this Court, there is no issue of public interest and the Court should deny review under RAP 2.3(d)(3).

D. **Review is not authorized under RAP 2.3(d)(4)**

The petitioner does not allege that the Superior Court departed from the accepted and usual course of judicial proceedings; therefore no review is authorized under RAP 2.3(d)(4).

VI. CONCLUSION

This court should deny review of the Superior Court's decision because the petitioner has not established any grounds for appeal under RAP 2.3(d). First, the Superior Court's decision regarding the officer's opinion testimony was consistent with prior Court of Appeals and Supreme Court cases, including Seattle v. Heatley, State v. Black, State v. Garrison and State v. Farr-Lenzini. Second, there is no significant constitutional issue raised because the testimony at issue in this case did not improperly comment directly on the guilt of the petitioner and therefore did not invade the province of the jury. Finally, no issue of public importance is presented under the emergency prong of RCW 10.93.070 because the issue has already been clearly addressed by the legislature and this Court in City of Tacoma v. Durham. For all these reasons, the State asks that the Court deny petitioner's motion for discretionary review.

DATED this 4th day of September, 2007.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By: _____
JEFFREY W. HOLMES, WSBA #37904
Deputy Prosecuting Attorney

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, v. TYLER KING, Petitioner.	No. 36606-1-II Clark Co. No. 06-1-02322-6 District Co. No. 63660 DECLARATION OF TRANSMISSION BY MAILING

FILED
COURT OF APPEALS
DIVISION II
07 SEP -6 AM 9:17
STATE OF WASHINGTON
BY
DEPUTY

STATE OF WASHINGTON)
: ss
COUNTY OF CLARK)

On September 5, 2007, I deposited in the mails of the United States of America by Federal Express a properly stamped and addressed envelope directed to David Ponzoha, Clerk of the Court of Appeals, Division II at 950 Broadway, Suite 300, Tacoma, WA 98402-4454, a copy of the Response to Motion for Discretionary Review.

Further on September 5, 2007, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals containing a copy of the document to which this Declaration is attached.

TO:		
	Mark Muenster Attorney At Law 1010 Esther Street Vancouver, WA 98660	Tyler King c/o Attorney

DOCUMENTS: RESPONSE TO MOTION FOR DISCRETIONARY REVIEW

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Abby Rowland

Date: September 5, 2007.
Place: Vancouver, Washington.